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August 12, 2013

**BY FACSIMILE AND HAND DELIVERY**

Kim Collins  
Office of General Counsel  
Federal Election Commission  
999 E Street, N.W.  
Washington, D.C. 20463

**Re: MUR 6717**

Dear Ms. Collins:

We write on behalf of the DNC Services Corporation/Democratic National Committee and Andrew Tobias, Treasurer (collectively, the "DNC") in response to a complaint filed by Cause of Action and its Executive Director, Daniel Epstein, on February 4, 2013 (the "Complaint"). The Complaint concerns two disbursements totaling roughly \$2,500 made by the DNC to the Department of Health and Human Services ("HHS") to pay for travel by Secretary Kathleen Sebelius and an aide. Secretary Sebelius and her aide traveled to Charlotte, North Carolina to speak at an event organized and hosted by the Human Rights Campaign ("HRC"). While the event was originally planned as an appearance in the Secretary's official capacity, the event was re-categorized as political, and the DNC volunteered to pay for the related costs to avoid any government funds being used for a political purpose.

The payments made by the DNC in these circumstances were completely appropriate and were listed on the DNC's reports filed with the Federal Election Commission (the "FEC" or "Commission") as required by the Federal Election Campaign Act of 1971, as amended (the "Act") and the Commission's regulations. No violations of the Act were committed.

The Complaint makes a number of incorrect allegations, including that HHS's original payment for the travel constituted an in-kind contribution to the DNC, that the DNC was required to report a debt owed to HHS, that the DNC's payments for the travel should have been reported as

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"independent expenditures," and that the DNC should have described the purpose of the disbursements differently.

These allegations are entirely manufactured and without merit. Given that the DNC was not obligated to pay for the costs related to the HRC event and did so in unforeseen and unusual circumstances in order to resolve a question of the Federal government's use of taxpayer funds, it should not have reported any in-kind contribution or debt on its FEC reports. Furthermore, the disbursements were properly listed as "Other Federal Operating Expenditures" and described as being for the purpose of "Travel." Accordingly, the Commission should find no reason to believe that Respondents violated the Act and dismiss the Complaint immediately.

### **Factual Background**

The underlying facts in this matter are public knowledge, have largely been set forth in a report by the Office of Special Counsel ("OSC"),<sup>1</sup> and are essentially as detailed in the Complaint.

On February 25, 2012, Secretary Sebelius and an aide traveled to Charlotte, North Carolina in order to speak at an HRC event. While the Secretary's participation in the event was originally scheduled as an official appearance, it was then reclassified as a political event due to extemporaneous remarks made by the Secretary.<sup>2</sup>

The Secretary's remarks at the HRC event almost entirely concerned the Administration's policies, including its framework for the economy, advancements made for LGBT Americans, and the passage of the Affordable Care Act.<sup>3</sup> However, a few seconds of her remarks also concerned elections.

Given the Secretary's comments, HHS sought reimbursement for its travel expenses associated with the HRC event, and the DNC volunteered to pay for the expenses. HHS originally informed the DNC that the costs amounted to \$1,003.69. Accordingly, the DNC issued a check in that amount to HHS on April 12, 2012. The DNC reported this disbursement on Schedule B of its 2012 April Monthly report to the FEC, plainly listing the purpose of the disbursement as "Travel." Thereafter, on July 23, 2012, HHS informed the DNC that it realized that there was an additional \$1,510.81 in travel costs. The DNC agreed to pay these costs as well, and issued HHS

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<sup>1</sup> See U.S. Office of Special Counsel, "Report of Prohibited Political Activity under the Hatch Act," OSC File No. HA-12-1989 (Kathleen G. Sebelius), August 23, 2012 (hereinafter "OSC Report"), available at <http://www.osc.gov/documents/hatchact/Hatch%20Act%20Report%20on%20HHS%20Secretary%20Kathleen%20Sebelius.pdf>.

<sup>2</sup> *Id.* at 4.

<sup>3</sup> *Id.* at 3.

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a check on August 2, 2012. The DNC then reported the disbursement on Schedule B of its 2012 August Monthly report to the FEC, again describing the purpose of the disbursement as "Travel."

### Legal Analysis

A. *HHS did not make a reportable contribution to the DNC, and the DNC did not incur a reportable debt to HHS.*

The Complaint's allegation that when HHS first paid for the Secretary's travel in connection with the HRC event, it constituted an unreported in-kind contribution until reimbursed is meritless.

Pursuant to 11 C.F.R. § 100.52, there was simply no "provision" of anything of value to the DNC in connection with the HRC Event. There is no allegation that the DNC requested or arranged for the Secretary to appear at the HRC event, or that her attendance was made in any way "on behalf of" the DNC. Indeed, as determined by OSC in its investigation, it was HRC that invited the Secretary to speak at its event, and furthermore, the electoral portion of the Secretary's speech was unplanned, off-the-cuff, and a departure from her prepared outline. According to the Commission, when, as is the case here, travel to an event is not "specifically authorized or requested" by a political committee, the payment for such travel is not a contribution.<sup>4</sup>

The DNC volunteered to pay for the relevant portion of the Secretary's travel when the matter was brought to its attention. However, as the costs incurred in connection with the HRC event were not on the DNC's behalf and the DNC had no obligation to pay for them, it did not receive or fail to report any in-kind contribution from HHS. Moreover, the payment for the travel by HHS could not have been a contribution to the DNC because it was made by the Federal government which is not a "person" within the meaning of the Act.<sup>5</sup>

As HHS could not have made a contribution to the DNC, there was no contribution for the DNC to report, and thus, no violation of Section 104.3(a)(2)(i), nor could the DNC have incurred a reportable "debt."

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<sup>4</sup> FEC MUR 5937, Supplemental Statement of Reasons of Vice Chairman Matthew S. Peterson and Commissioners Caroline C. Hunter and Donald F. McGahn II (June 16, 2009). While there has been ongoing discussion of when travel should be deemed to have been "on behalf of" a political committee, there is no dispute that travel made independently of a committee is not a contribution to that committee. See FEC MUR 5937, Statement of Reasons of Commissioners Cynthia L. Bauerly and Ellen L. Weintraub (March 16, 2009).

<sup>5</sup> 2 U.S.C. § 431(11).

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*B. The DNC's payments to HHS were not "independent expenditures."*

The Complaint's next claim is that the DNC should have reported the travel payments as "independent expenditures" on Schedule E under 11 C.F.R. § 104.3(b)(3)(vii) rather than as standard operating expenditures. Because the Secretary's statements were extemporaneous, the Complaint posits that they must technically be "independent expenditures." This is absurd. The DNC had no role in the making of the statements, and paid the associated travel expenses after-the-fact to address the issue of the use of government funds. How "independent expenditures" by the DNC is any part of this case is a mystery.<sup>6</sup>

The DNC correctly reported its payments to HHS as operating expenditures on Schedule B of its relevant FEC reports.

*C. The DNC properly described the purpose of its disbursements.*

Finally, the Complaint alleges that the DNC violated 11 C.F.R. § 104.3(b)(3) because the description of the purpose of the payments was insufficient. As stated above, the DNC described the purpose of each payment as "Travel." In support of its argument that the DNC should have included more information, the Complaint cites generally to the FEC's Statement of Policy entitled, "*Purpose of Disbursement*" Entries for Filing with the Commission.<sup>7</sup> What the Complaint fails to note is that the Commission's Statement of Policy specifically included "Travel" on a list of "descriptions of purpose that provide sufficient detail."<sup>8</sup> Indeed, "travel" is probably one of the most frequently used descriptions of purpose on political committee FEC reports generally.

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<sup>6</sup> Furthermore, the Commission has previously determined that payments for travel connected with an individual's speech do not constitute "independent expenditures" under the Act, even if the speech contains "express advocacy." See FEC MUR 5642, Statement of Reasons of Chairman Robert D. Lenhard and Commissioner Ellen L. Weintraub (January 2, 2008) and Statement of Reasons of Vice Chairman David M. Mason and Commissioner Hans A. von Spakovsky (December 31, 2007).

<sup>7</sup> 72 Fed. Reg. 887 (Jan. 9, 2007).

<sup>8</sup> *Id.* at 888.

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For the reasons stated above, the Commission should dismiss this case immediately.

Very truly yours,

A handwritten signature in black ink, appearing to read 'R. Bauer', with a long, sweeping horizontal stroke extending to the right.

Robert F. Bauer  
Graham M. Wilson  
Counsel to Respondents

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